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# Rationalising Tort Law for the Twenty-First Century

KEN OLIPHANT

## I. Introduction

Here's a radical idea: let's rationalise the law of tort so that it's intelligible to ordinary people. Doesn't sound very radical, does it? Maybe not, but two recent episodes have made me think it should be a priority in developing tort law in the twenty-first century.

The first was this. In May 2012, anniversary celebrations in Paisley, Scotland, marked the 80th birthday of the House of Lords' decision in *Donoghue v Stevenson*.<sup>1</sup> I was at that time Director of the Institute for European Tort Law in Vienna and gave a lecture offering some comparative observations on the great case from the standpoint of the codified civil law tradition of continental Europe. My title was: 'Let's codify the neighbour principle.' Though the conference proceedings were subsequently published in a special issue of the Scottish legal periodical, the *Juridical Review*,<sup>2</sup> you will look in vain there for my own paper. I have to confess that I simply failed to produce a concise, declaratory version of the neighbour principle, or any of the more modern tests for the existence of a duty of care, that made any sense at all while remaining faithful to the existing case law. All the exercise accomplished was to persuade me that the common law's whole approach to the duty of care concept is so completely incoherent

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<sup>1</sup> [1932] AC 562 (HL).

<sup>2</sup> J Thompson (ed), *Juridical Review. Donoghue v Stevenson: The Paisley Papers* (Edinburgh, W Green, 2013).

that it precludes any effort to communicate or discuss its nature and role in intelligible terms. I believe that this is emblematic of a wider intelligibility problem in the law of tort.

My other main impulse was a curious feature of some of the legislation that has addressed the English common law of tort in recent years.<sup>3</sup> Successive statutes—and here I particularly have in mind section 1 of the Compensation Act 2006 and the Social Action, Responsibility and Heroism (SARAH) Act of 2015—explicitly purported to do no more than re-state particular aspects of the existing common law because it was felt that public misconceptions about what the law required were having a detrimental effect on how people conducted themselves.<sup>4</sup> The predominant attitude to the reforms of English tort lawyers has been that they are pretty much an irrelevance,<sup>5</sup> but it seems to me that they are more significant than is generally admitted, though probably not in a way intended by their proponents. To me, the main significance of these ‘micro-restatements’ is to highlight the unintelligibility to most ordinary people of even the simplest component parts of our law of tortious liability and our utter failure as tort lawyers to communicate the basics of tort law to the wider community and to engage in public debate about its future. There are doubtless numerous reasons why we have failed so badly, one being a prevalent attitude, at least amongst academic tort lawyers, that what Parliament does is out of our hands, and not our concern, and that our focus

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<sup>3</sup> For a broader survey of tort law legislation, see TT Arvind and J Steele (eds), *Tort Law and the Legislature* (Oxford, Hart Publishing, 2013).

<sup>4</sup> As to Compensation Act 2006, s 1, see M Lunney and K Oliphant, *Tort Law: Text and Materials*, 5th edn (Oxford, Oxford University Press, 2013) 172 ff; as to the SARAH Act, see K Oliphant, ‘Notes on SARAH: The Social Action, Responsibility and Heroism Act 2015’ (*Tort Law*, 11 May 2015) <<https://www.facebook.com/lawoftort/posts/10152959370596509>> accessed 1 May 2016.

<sup>5</sup> So far as I know, the only academic article on s 1 of the Compensation Act 2006 to have been published at the time was K Williams, ‘Politics, the Media and Refining the Notion of Fault: Section 1 of the Compensation Act 2006’ [2006] *Journal of Personal Injury Law* 347. Even in Arvind and Steele (n 3), the provision is given only brief attention in just two places (66 and 251). As regards the SARAH Act, a Westlaw search on 1 May 2016 revealed only one short academic comment on the reform: A Okoye, ‘The UK Social Action, Responsibility and Heroism (SARAH) Act 2015 and Corporate Social Responsibility (CSR): Potential Connections’ (2015) 26 *International Company and Commercial Law Review* 373.

should be the ‘immanent rationality’<sup>6</sup> of the common law.<sup>7</sup> But the factor I wish to highlight here—arguably, the most important factor—is that the subject matter of tort is simply incoherent on multiple levels. If we, as members of the legal community, are to communicate the content of tort law in terms intelligible to the wider public, to engage in debates about its merits and, where appropriate, to lead the way in shaping its future development, we need first to take steps to rationalise what remains a ramshackle, under-systematised corpus of law. To that end, I here present three, tentative proposals, which I hope will set us in the right direction.

## II. Three Proposals to Rationalise the Law of Tort

To anyone who doubts that tort law is an incoherent mess, ask yourself the following elementary questions: How many torts are there? Do we really need so many? Is the real focus of tort law on rights, wrongs, duties or simply compensation for loss? If the answer is ‘all of the above’, can tort law actually play these different roles concurrently without self-contradiction? Conversely, is it coherent to see tort law as ‘just’ concerned with rights, or just with duties, and are its duties in fact ‘real’ duties at all? Some of these questions (e.g., do we need so many torts?) have been almost completely neglected in the tort law literature; others (e.g., what is tort’s real focus?) have sparked intensive debate, though opinions on them remain defiantly polarised.<sup>8</sup> It is therefore with a certain trepidation that I venture some simple thoughts as to how they might most convincingly be answered, in setting out a rather personal selection of issues that

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<sup>6</sup> E Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’ (1988) 97 *Yale Law Journal* 949 (propounding an account of law as elaborated from within rather than exported from outside by way of the legislative process).

<sup>7</sup> For criticism of this attitude, see P Cane, ‘Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law’ (2005) 25 *OJLS* 393 (arguing that we should prefer statute to common law because pluralistic political processes provide a superior mechanism for resolving disagreement as to values and the functions and effects of law). See also J Goudkamp and J Murphy, ‘Tort Statutes and Tort Theories’ (2015) 131 *LQR* 133.

<sup>8</sup> Seeing tort as focused on rights: R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007). Seeing tort as focused on wrongs within a framework of corrective justice: E Weinrib, *The Idea of Private Law* (Cambridge, Mass, Harvard University Press, 1995); A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing 2007). Seeing tort as focused on duties: P Birks, ‘The Concept of a Civil Wrong’ in D Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Clarendon Press 1995). This is only a small selection from the literature.

I believe need to be addressed if tort law really is to be intelligibly communicated to those subject to its rules: the public generally.

#### A. Rationalising the Bases of Tortious Liability (Do We Need 70+ Torts?)

As I have noted before,<sup>9</sup> a first step would be to rationalise the number of distinct liabilities we recognise in the law of tort. Bernard Rudden famously listed some seventy different torts that are recognised in one or other common law jurisdictions, but made no pretence of completeness and accepted that some of the liabilities listed could legitimately be broken down into further, more narrowly defined sub-torts.<sup>10</sup> Since he wrote, a number of additional torts might plausibly be added to the list—for example, harassment,<sup>11</sup> interference with reproductive autonomy,<sup>12</sup> infringement of EU competition law<sup>13</sup> and governmental violation of EU law.<sup>14</sup> Is this profusion of causes of action really necessary, or could Occam's razor<sup>15</sup> usefully be applied to some causes of action, which, on closer analysis, turn out to be superfluous?

Our Continental neighbours certainly make do with far fewer tortious liabilities. France provides perhaps the most extreme—as well as the most celebrated—example, dealing with the substantially the whole of its law of *responsabilité extra-contractuelle* in just five articles of the *Code Civil*, beginning with the general liability for fault in art 1382. The following articles clarify the meaning of this general clause (art 1383) and

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<sup>9</sup> K Oliphant, 'European Tort Law: A Primer for the Common Lawyer' (2009) 62 *Current Legal Problems* 440, 470.

<sup>10</sup> B Rudden, 'Tortiles' (1991-1992) 6/7 *Tulane Civil Law Forum* 105.

<sup>11</sup> Protection from Harassment Act 1997.

<sup>12</sup> cf *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309; N Priaulx, 'Joy to the World! A (Healthy) Child is Born! Reconceptualizing "Harm" in Wrongful Conception' (2004) 13 *Social and Legal Studies* 5.

<sup>13</sup> Case C-453/99 *Courage v Crehan* [2001] ECR I-6297; *Crehan v Innentrepreneur Pub Co* [2006] UKHL 38, [2007] 1 AC 333

<sup>14</sup> Case C-6/90 *Francovich v Italy* [1991] ECR I-5357; *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)* [2000] 1 AC 524.

<sup>15</sup> cf K Barker, 'Wielding Occam's Razor: Pruning Strategies for Economic Loss' (2006) 26 *OJLS* 289; J Stapleton, 'Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 *LQR* 426.

add to it a set of strict liabilities (as they are now seen to be)<sup>16</sup> in respect of persons and things (art 1384), animals (art 1385) and the collapse of a building (art 1386). The German Civil Code (*Bürgerliches Gesetzbuch*, BGB) is not so concise: the thirty-one paragraphs it devotes to torts (*unerlaubte Handlung*)<sup>17</sup> contain three liabilities of general scope, sometimes termed its three ‘mini general clauses’.<sup>18</sup> These consist in a general liability for fault, restricted to unlawful violation of specific interests (§ 823 I BGB), a liability for breach of statutory duty (§ 823 II BGB), and a liability for intentional damage contrary to public policy (§ 826 BGB). In addition, there is a miscellaneous set of more specific liabilities, numbering perhaps five in all, depending on how one counts them.<sup>19</sup> That gives us an overall total of eight distinct causes of action—still considerably fewer than the common law’s 70+.

This superabundance of liabilities has been a recipe for confusion. There is all too often a lack of any clear rationale for differences between overlapping causes of action,<sup>20</sup> while apparently common concepts are given different meanings even in torts that are closely connected, as recently highlighted with regard to the concept of

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<sup>16</sup> cf E Tomlinson, ‘Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking’ (1988) 48 *Louisiana Law Review* 1299.

<sup>17</sup> As to the different German terms that may be translated as ‘tort’, and how none of them is an exact equivalent, see H Koziol, ‘*Schadenersatzrecht* and the Law of Tort: Different Terms and Different Ways of Thinking’ (2014) 5 *Journal of European Tort Law* 257.

<sup>18</sup> Following Claus-Wilhelm Canaris, ‘Schutzgesetze — Verkehrspflichten — Schutzpflichten’, in Claus-Wilhelm Canaris and U Diederichsen, *Festschrift für Karl Larenz zum 80. Geburtstag* (Munich, Beck Publishing, 1983) 35 (*drei kleinen Generalklauseln*). See further C van Dam, *European Tort Law*, 2nd edn (Oxford, Oxford University Press, 2013) para 402-1 (‘three general provisions’). cf B Markesinis and H Unberath, *The German Law of Torts: A Comparative Treatise*, 4th edn (Oxford, Hart Publishing, 2002) 69 (using the term ‘mini-general clause’ specifically in respect of § 823 I).

<sup>19</sup> I have included in my count the liabilities for endangering credit (§ 824 BGB) and inducing others to sexual acts (§ 825 BGB), the liability of keepers and minders of animals (§ 833 ff), liability for the collapse of buildings and the breaking off of building parts (§ 836 ff) and the liability of public officials for breach of duty (§ 839, supplemented by § 839a in respect of court-appointed experts). I have not included the provisions on liability for agents (§ 831) or the liability of persons with a duty of supervision (§ 832) as these are just liabilities for unlawful damage with a reversed burden of proof. Other provisions in the same chapter deal with such issues as the exclusion of liability, the responsibility of minors, joint tortfeasors and damages.

<sup>20</sup> See, eg, Lord Rodger, ‘Foreword’, in E Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (Oxford, Oxford University Press, 2009), referring to the conflict between principles of negligence and principles of defamation highlighted in *Spring v Guardian Assurance plc* [1995] 2 AC 296 (HL).

‘unlawful means’ in the economic torts.<sup>21</sup> No distinction in the causes of action is to be left without legal consequence, or so it seems. It has been remarked that the economic torts have ‘lacked their Atkin’<sup>22</sup>—adverting to Lord Atkin’s leading role in providing the re-conceptualisation of negligence to fit it for purpose in the twentieth century. As the task is not the sole preserve of judges but falls to academics too, one might add that the economic torts—indeed the law of torts as a whole—have also yet to find their Peter Birks.<sup>23</sup>

I do not purport in this article to provide a comprehensive revision of the distinct bases of tortious liability, indicating which torts to keep and which to abolish. Before one gets to that stage, one must first identify the criteria to be applied. So I content myself here with merely proposing a simple methodological first step and briefly illustrating how it might be applied. I would begin by asking: what tortious liabilities do we really need beyond negligence? Negligence’s expansion and displacement of other torts in practice has not always been greeted with approbation.<sup>24</sup> But it is recognised even by its critics that it now provides a cause of action in many situations where liability was already recognised under some other tort.<sup>25</sup> This raises the ulterior question of whether these overlapping causes of action should be perpetuated. The answer depends on whether there is any good reason for allowing an alternative claim because reliance solely upon negligence—the common law’s ‘general clause’—would be inadequate. Let me suggest a few possibilities.

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<sup>21</sup> Compare *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1 (causing loss by unlawful means) with *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174 (unlawful means conspiracy). The former decided that a crime giving rise to no civil liability was not ‘unlawful means’ for the general tort of causing loss by unlawful means; the latter declined to adopt the same rule for the tort of unlawful means conspiracy, accepting that a crime giving rise to no civil liability could indeed constitute ‘unlawful means’ in the law of conspiracy.

<sup>22</sup> Lord Wedderburn of Charlton, ‘Rocking the Torts’ (1983) 46 *MLR* 224, 229.

<sup>23</sup> Having in mind Birks’ enormous contribution to the systematisation of the English law of restitution, especially in P Birks, *An Introduction to the Law of Restitution* (Oxford, Clarendon Press, 1985). For Birks’ own account of the concept of tort, see Birks (n 8).

<sup>24</sup> See especially T Weir, ‘The Staggering March of Negligence’ in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Honour of John Fleming* (Oxford, Oxford University Press, 1998).

<sup>25</sup> See, eg, Stevens (n 8) 292–95, criticising ‘[t]he overlaps created by having one *über*-tort of negligence cutting across the rest’ (295).

To begin: one reason for having a set of torts additional to the tort of negligence is to allow for *strict liability* in those contexts in which such liability is considered desirable. A distinct legal basis must be provided for the liability as, by definition, there is no cause of action in negligence in the absence of (legal) fault.<sup>26</sup> So, even a rationalised law of tort would retain the strict liabilities that are currently recognised, though it would undoubtedly be desirable to develop a more coordinated approach to them and to remove anomalies—in England, strict liability arises mostly under statute<sup>27</sup> and takes a variety of different forms that have mostly escaped scholarly attempts at theorisation,<sup>28</sup> while the common law strict liability rule of *Rylands v Fletcher*<sup>29</sup> has been deprived of its practical significance through restrictive judicial interpretation of its scope<sup>30</sup> and should either be unfettered or abolished,<sup>31</sup> not left in its current legal limbo.<sup>32</sup>

A second reason for allowing tortious liability beyond the scope of the tort of negligence is that, as the law recognises (at least implicitly) a hierarchy of protected interests, it may be that certain interests are protected only against *intentional*, and not merely negligent interference. This is generally true, in particular, of purely economic interests and the interest in mental health. As regards the former, Lord Oliver once remarked that '[t]he infliction of physical injury to the person or property of another

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<sup>26</sup> cf T Honoré, *Responsibility and Fault* (Oxford, Hart Publishing, 1999) ch 4 ('The Morality of Tort Law: Questions and Answers').

<sup>27</sup> See, eg, Gas Act 1965, s 14 (underground gas storage); Nuclear Installations Act 1965, ss 7–10, 12 (nuclear matter and ionising radiations); Civil Aviation Act 1982, s 76(2) (things falling from aircraft); Environmental Protection Act 1990, s 73(6) (deposits of waste); Consumer Protection Act 1987, Part 1 (defective products); Water Industry Act 1991, s 209 (escapes of water); Merchant Shipping Act 1995, s 152 ff (oil pollution).

<sup>28</sup> cf K Stanton, 'New Forms of the Tort of Breach of Statutory Duty' (2004) 120 *LQR* 324, 332 (noting the lack of a common theory underpinning the strict liabilities arising under statute). See further K Stanton et al, *Statutory Torts* (London, Sweet & Maxwell, 2003).

<sup>29</sup> (1868) LR 3 HL 330.

<sup>30</sup> See especially *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1.

<sup>31</sup> As in Australian law, where the liability is now seen as derived from a non-delegable duty: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 (HCA).

<sup>32</sup> See further J Murphy, 'The Merits of *Rylands v Fletcher*' (2004) 24 *OJLS* 643 (favouring retention without the current restriction to interference with rights over land); D Nolan, 'The Distinctiveness of *Rylands v Fletcher*' (2005) 121 *LQR* 421 (favouring abolition).



universally requires to be justified. The causing of economic loss does not'.<sup>33</sup> But where the (pure) economic loss is caused intentionally, there is not the same reluctance to grant an entitlement to compensation and liability can be established even where it could not possibly arise in negligence, for example under the tort of causing loss by unlawful means<sup>34</sup> or the tort of procuring a breach of contract.<sup>35</sup> Something similar applies in respect of mental injury: in negligence, the liability is limited to recognised psychiatric harm suffered in certain proximate relationships,<sup>36</sup> but where the defendant intends to cause serious or significant distress liability can arise independently of such relationship under the rule in *Wilkinson v Downton*,<sup>37</sup> and possibly extends to severe distress unaccompanied by psychiatric illness.<sup>38</sup>

Conversely—providing a third reason for recognising causes of action supplementary to negligence—it may be considered desirable for the protection the law accords to specific interests to extend to immaterial harm that falls outside negligence's scope, so as to allow for compensation in the absence of physical injury or damage even though the interference is *unintentional*. Here one might mention the tort of private nuisance, providing for compensation for interference with the use and enjoyment of land even in the absence of physical harm, to reflect the reduction in the value of the land affected,<sup>39</sup> the tort of defamation (compensation for damage to reputation, vindication of good name, and distress, hurt and humiliation),<sup>40</sup> and the torts of trespass

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<sup>33</sup> *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 487.

<sup>34</sup> *OBG* (n 21).

<sup>35</sup> *Lumley v Gye* (1853) 2 El & Bl 216, 118 ER 749. Strictly speaking, the requisite intention is the intention to procure the breach of contract, rather than to cause economic loss (*OBG* (n 21) [8] (Lord Hoffmann)) though the two often go hand in hand. Still, the tort in *Lumley v Gye* is nevertheless an intentional tort, not one of negligence.

<sup>36</sup> As to primary victims, see *Page v Smith* [1996] 1 AC 155 (HL); as to secondary victims, see *Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310 (HL).

<sup>37</sup> *Wilkinson v Downton* [1897] 2 QB 57, as interpreted by *O (A Child) v Rhodes* [2015] UKSC 32, [2016] AC 219.

<sup>38</sup> As suggested in *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, [44]–[46] (Lord Hoffmann); *O (A Child)* (n 37) [116]–[119] (Lord Neuberger).

<sup>39</sup> *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL); D Nolan, 'Nuisance' in K Oliphant (ed), *The Law of Tort*, 3rd edn (London, LexisNexis Butterworths 2015) para 22.103.

<sup>40</sup> *John v MGN Ltd* [1997] QB 586, 607 (Sir Thomas Bingham MR). See generally A Kenyon, 'Problems with Defamation Damages' (1998) 24 *Monash University Law Review* 70.

to the person, allowing compensation for the upset and distress associated with unlawful touchings of the body (battery)<sup>41</sup> and the deprivation of liberty (false imprisonment).<sup>42</sup>

The last reason I shall suggest here for providing a separate head of claim for some of the liabilities just mentioned is that they require a specific balancing of countervailing rights and interests which cannot be accomplished so transparently or so effectively through the inquiry into breach of duty in the tort of negligence. Two examples may be given. First, in resolving disputes between neighbouring landowners, it is insufficient to ask whether the one took reasonable care in using the land so as to avoid or reduce the risk of interfering with the other's use and enjoyment of the land affected.<sup>43</sup> Instead, the law of private nuisance highlights a set of specific circumstances that together determine whether the interference is lawful or unlawful, including the degree and duration of the interference,<sup>44</sup> the character of the locality in which it occurs,<sup>45</sup> whether the claimant was unusually sensitive to the interference,<sup>46</sup> and whether the defendant was careless or malicious in causing the interference.<sup>47</sup> Specific rules address such commonly occurring scenarios as where the defendant has planning permission to pursue the activity in question,<sup>48</sup> where the defendant obstructs

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<sup>41</sup> *Richardson v Howie* [2005] PIQR Q48 (awards for injury to feelings are compensatory and not aggravated damages).

<sup>42</sup> *Murray v Ministry of Defence* [1988] 1 WLR 692 (HL), 703 (Lord Griffiths) ('The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage').

<sup>43</sup> *Rapier v London Tramways* [1893] 2 Ch 588, 599–600 (Lindley LJ) ('At common law, if I am sued for a nuisance, and the nuisance is proved, it is no defence on my part to say, and to prove, that I have taken all reasonable care to prevent it'); *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264 (HL), 299 (Lord Goff) ('if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it').

<sup>44</sup> *Colls v Home and Colonial Stores Ltd* [1904] AC 179 (HL), 184 (Earl of Halsbury LC) (a question of degree); *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (intensity and frequency of smell making it an actionable nuisance).

<sup>45</sup> *Sturges v Bridgman* (1879) 11 Ch D 852; *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822.

<sup>46</sup> *Robinson v Kilvert* (1889) 41 Ch D 88. But cf *Network Rail Infrastructure Ltd v CJ Morris* [2004] EWCA Civ 172, [2004] Env LR 861.

<sup>47</sup> *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409 (carelessly conducted demolition works); *Christie v Davey* [1893] 1 Ch 316 (maliciously making noise).

<sup>48</sup> *Lawrence* (n 45).

the claimant's light<sup>49</sup> or ventilation,<sup>50</sup> or removes support to the claimant's land,<sup>51</sup> and where the claimant 'comes to the nuisance'.<sup>52</sup> These rules give the law clarity and predictability in its application to ongoing relationships, which would be impossible to achieve through the vague standard of reasonable care in negligence. Second, the law of defamation must perform the difficult task of balancing rights to reputation with the countervailing public interest in freedom of expression. It does so in particular<sup>53</sup> by recognising a set of defences—absolute privilege,<sup>54</sup> qualified privilege,<sup>55</sup> honest opinion<sup>56</sup> and publication on matter of public interest<sup>57</sup>—that allow persons to speak freely about others in particular contexts and in particular ways without the 'chilling effect'<sup>58</sup> of being judged against the vague standard of reasonable care if they cannot demonstrate the truth of their statements.<sup>59</sup> The same concern to ensure clarity and predictability about the scope for freedom of expression also applies in other torts, as recently underlined in respect of liability under *Wilkinson v Downton*.<sup>60</sup>

On one level, a rationalisation of tort law along the lines suggested would not be radical at all, as one would be left with the familiar structure of liability for negligence,

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<sup>49</sup> *Colls* (n 44).

<sup>50</sup> *Chastey v Ackland* [1895] 2 Ch 389 (no right to general current of air). The parties settled in the course of the House of Lords' hearing of the claimant's appeal, during which several Law Lords expressed dissent from the Court of Appeal's reasoning and decision: [1897] AC 155. See further I Dawson and A Dunn, 'Negative Easements—a Crumb of Analysis' (1998) 18 *Legal Studies* 510, 518–20.

<sup>51</sup> *Backhouse v Bonomi* (1861) 9 HL Cas 503; cf *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 (right to support of building acquired by easement).

<sup>52</sup> *Bliss v Hall* (1838) 4 Bing NC 183; *Lawrence* (n 45) [51] f (Lord Neuberger). A different approach might be warranted if the claimant has changed the use of the property affected after the commencement of the defendant's activity: *ibid* [53].

<sup>53</sup> But also through the recently adopted statutory requirement that publication has caused or is likely to cause serious harm to the claimant's reputation: Defamation Act 2013, s 1(1).

<sup>54</sup> eg under Bill of Rights 1689, art 9 ('That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament'); Parliamentary Papers Act 1840, s 1 (reports, etc, ordered to be published by Parliament); *Westcott v Westcott* [2008] EWCA Civ 818, [2009] QB 407 (witness immunity).

<sup>55</sup> *Adam v Ward* [1917] AC 309 (reciprocal duty or interest); Defamation Act 1996, s 15 (specified reports); Defamation Act 2013, s 6 (peer-reviewed statements in scientific or academic journals etc).

<sup>56</sup> Defamation Act 2013, s 3.

<sup>57</sup> *ibid* s 4.

<sup>58</sup> See especially Ministry of Justice, *Draft Defamation Bill Consultation* (Cm 8020, 2011) para 8 ff.

<sup>59</sup> Truth is, of course, an independent defence to liability in defamation: Defamation Act 2013, s 2.

<sup>60</sup> *Wilkinson* (n 37), considered by Lord Neuberger in *O (A Child)* (n 37) [104].

liability for intentional injury and strict liability,<sup>61</sup> supplemented with a miscellaneous set of liabilities arising in specific contexts and/or addressing specific interests. However, asking the simple question ‘what tortious liabilities do we really need beyond negligence?’ has radical potential as a first step towards excising those torts that no longer serve a useful purpose and then—as a future second step—the re-categorisation of what remains in simpler, more rational terms.

## B. Separating The Functions of Compensating Loss and Protecting Rights

The alert reader may have noted that I did not include the vindication or protection of rights amongst the illustrative reasons I gave for recognising tortious liability outside the tort of negligence. That is because I think that to do so should not be the task of tort law at all—at least, insofar as one is speaking of direct rather than indirect vindication, in the sense I shall specify shortly.

Robert Stevens’ now well-known thesis<sup>62</sup> is that, in the common law, the law of tort(s) is best conceived as ‘concerned with the secondary obligations generated by the infringement of primary rights’,<sup>63</sup> and this conception is fundamentally different from, and preferable to, the rival conception of tort law as concerned primarily with liability for the infliction of loss (which he takes to be probably the dominant conception in the common law today, as well as that embodied in French tort law).<sup>64</sup> In my opinion, it is too crude to characterise entire legal systems exclusively in terms of loss-compensation or rights-protection, and the perceived contrasts often reflect nothing more than differences in the definitions of primary rights or the scope of their protection, rather than an underlying difference in conception. In formal terms, liability under any system of civil justice is a secondary legal relation arising out of the violation

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<sup>61</sup> This tripartite structure can be traced back to Anon [identified as Oliver Wendell Holmes], ‘The Theory of Torts’ (1873) 7 *American Law Review* 652.

<sup>62</sup> Stevens (n 8).

<sup>63</sup> *ibid* 2.

<sup>64</sup> *ibid* 1-3 and 342-45.

of a primary (claim) right<sup>65</sup>—whatever the scope of the primary rights recognised by that system. The primary rights dictate the range of harms ('the damage') for which the secondary obligation to pay damages may arise. But there is *no* set of primary rights—and *no* range of compensable harms—for which the basic principle does not hold true. In formal terms, civil liability is always and necessarily a secondary relation arising out of the violation of a primary right. The rights protected by a general liability clause (such as art 1382 of the French *Code Civil*) are simply more extensive—the set of bilateral claim right/duty relations is larger—than under the common law of tort, which restricts or even excludes liability for interference with certain protected interests in specific circumstances.

And yet, there is at least one respect in which the common law of tort is wider in scope than the tort law of other legal systems, which is that it serves a variety of purposes ulterior to the compensation of the injured (and wronged) victim—and these include the protection or vindication of rights by mechanisms that one does not find *in tort law* in the civilian legal world.<sup>66</sup> This is something that Stevens brings out clearly

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<sup>65</sup> Adopting the analysis of W Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16; 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710. In fact, Hohfeld treated the commission of a tort as giving rise to a new *right or claim* in favour of the injured party, corresponding to a *duty* on the tortfeasor to pay damages (see (1917) 26 *Yale Law Journal* 710, 752 f). But it is more accurate to see the 'right of action' as a power to require the defendant to pay damages through the coercive machinery of the state: B Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 *Vanderbilt Law Review* 1, 80 f; 'Civil Recourse, not Corrective Justice' (2003) 91 *Georgia Law Journal* 695, 720 f. After all, it is hard to see how the defendant has a *duty* to pay damages at least until the claimant brings an action, and arguably until the action is resolved in the claimant's favour.

Henry M Hart and Albert M Sacks, *The Legal Process* (tentative edn, 1958) 154 also see the right of action as a power:

A right of action is a species of power - of remedial power. It is a capacity to invoke the judgment of a tribunal of authoritative application upon a disputed question about the application of preexisting arrangements and to secure, if the claim proves to be well-founded, an appropriate official remedy.'

The authors seem reluctant to accept, however, that this power correlates to a liability, saying : '[a] right of action is ... not simply a reflection of somebody else's legal position' (ibid). Yet the quoted passage suggests that there is indeed a corresponding liability here—though Hart and Sacks focus on the liability of the court to be required to grant a remedy, not the liability of the defendant to be required to pay damages. In fact, both jural relations seem to be involved in the concept of a right of action.

<sup>66</sup> As to vindication, see, eg, *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962; K Barker, 'Private and Public: The Mixed Concept of Vindication in Torts and Private Law' in S Pitel, J Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Oxford, Hart Publishing, 2013); J Varuhas, 'The Concept of "vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34 *OJLS* 253. Another ulterior purpose, not pursued in this chapter, is punishment by way of the award of exemplary damages.

and convincingly in his monograph,<sup>67</sup> but I differ from him in finding this problematic, rather than something to be encouraged. In the common law, the protection and vindication of primary rights is indeed inextricably bound up with the entitlement to compensation for loss caused by interference with those rights. However, this creates potential anomalies and arbitrariness of outcome, and prevents the law from performing *either function* (protecting and vindicating rights/compensating for loss) with full effectiveness.

As a preliminary to further analysis, it is important to understand that the protection of rights can be achieved by both direct and indirect mechanisms. Compensatory damages can themselves be regarded as a means of protecting rights, in particular by giving potential infringers a financial incentive not to infringe and by providing—insofar as one can do so by the award of damages—for the continuation of the right in virtual (normative/juridical) form even when it can no longer ‘really’ be enforced because the harm suffered is irreversible.<sup>68</sup> This is the sense in which, for example, the Court of Justice of the European Union<sup>69</sup> and European Court of Human Rights have affirmed that compensation for damage caused by the violation of a right recognised in their respective legal orders may be necessary to ensure the right’s effective protection.<sup>70</sup>

Yet my concern here is *direct* protection of primary rights by way of specific relief: injunctions, declarations, and—where directed against a public authority—what

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<sup>67</sup> Stevens (n 8) ch 2.

<sup>68</sup> See E Weinrib, ‘Civil Recourse and Corrective Justice’ (2011) 39 *Florida State University Law Review* 273 (‘the remedy is the continuation of the right’: 274); H Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Sramek, 2012) paras 3/8–3/11 (*Rechtsfortsetzung*). A similar idea seems to underlie Stevens’ theory of substitutive damages: Stevens (n 8) 59 ff.

<sup>69</sup> Case C-58/89, *Brasserie du Pêcheur v Germany* [1991] ECR I-4983, [51] f and [82] (effective protection of the rights conferred by EU law requires reparation commensurate with the loss or damage sustained).

<sup>70</sup> The right to an effective remedy under art 13 ECHR has been interpreted as requiring the availability of compensation in many circumstances where Convention rights have been violated. See eg *Z v United Kingdom* (2002) 34 EHRR 97, para 109 (‘in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be part of the range of available remedies’). Additionally, art 5(5) of the ECHR itself provides for an enforceable right to compensation for victims of arrest or detention in contravention of the preceding provisions of art 5.

were once known as the prerogative writs.<sup>71</sup> I would propose, as a second step towards the rationalisation of the common law of tort, the separating out of the two functions of rights-protection and compensation of loss. Or, to be more specific: to separate the direct protection of rights by way of specific relief from the compensation of loss by way of damages. The latter is tort law; the former is not.

To focus for now just on injunctions: these have traditionally been seen as a remedy for an (actual or threatened) wrong, and their availability has depended upon satisfying the elements of the tort, or whatever other wrong is involved.<sup>72</sup> This has created tension in the law, as protection of the right may demand one rule while imposing on the infringer an obligation to compensate for the loss thereby arising may call for a different rule. The injurer's liability generally requires proof of fault, but why should rights be protected only against *culpable* interference? Conversely, if the right is protected against non-culpable interference, what is the basis in justice in making the interferer *strictly* liable for the resulting loss? To avoid being caught on the horns of this dilemma, we need to make the requirements for an injunction less demanding than those for damages—at least if the injunction is negative (i.e. prohibitory) in form, as this only requires the defendant to desist from some specified action, whereas damages place an immediate financial burden on the defendant.<sup>73</sup>

We can see the tension between the pulls of rights-protection and compensation for loss in a number of areas of tort law, perhaps especially in relation to interference with land and goods. English law has no *vindicatio*, no specific mechanism for saying

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<sup>71</sup> See now Civil Procedure Rules 1998, Part 54.

<sup>72</sup> *Siskina (Cargo Owners) v Distos Compania Naviera SA, The Siskina* [1979] AC 210 (HL), 254 and 256 (Lord Diplock) (the entitlement to an injunction cannot stand on its own but is dependent on there being a pre-existing cause of action against the defendant). The general rule is subject to a few narrow exceptions, eg, in the case of injunctions to prevent foreign proceedings: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81 (Lord Diplock); *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889. Of course, in the case of *quia timet* injunctions, it must only be shown that there is a strong probability that injury will result and not that it has actually occurred: *Attorney-General v Manchester Corporation* [1893] 2 Ch 87, 92 (Chitty J);

<sup>73</sup> cf Koziol (n 68) para 2/7.

‘That is my chattel or land and I want it back.’<sup>74</sup> So the task of allowing the enforcement of rights over property has fallen to the law of tort, and become inextricably but problematically linked with the need to show that the defendant has committed a wrong.<sup>75</sup> Tort has been *distorted* insofar as the owner’s rights over the property have been recognised through the award of damages even where the supposed tortfeasor has acted without fault (i.e. by the imposition of strict liability). By contrast, in civil law systems the owner of property who has been dispossessed uses non-tortious mechanisms to get it back.<sup>76</sup> As the remedy is independent of tort, it is not necessary to satisfy the requirements of tort liability (for example, fault). This does not, of course, preclude separate proceedings in tort to recover damages for harm resulting from the deprivation of use where fault or some other basis of tortious responsibility can be established.<sup>77</sup>

A couple of illustrations may be useful. Let us first consider the tort of conversion: deliberate conduct that is inconsistent with the rights of an owner of goods and so extensive an encroachment on his rights as to exclude him from the use and possession of the goods.<sup>78</sup> The tort is one of strict liability in which fault in the sense of either knowledge of the risk of harm or lack of reasonable care plays no part.<sup>79</sup> Undoubtedly, the strictness of the action was introduced to enable the owner to vindicate his proprietary rights over the converted goods.<sup>80</sup> As Cane writes: ‘The

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<sup>74</sup> A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford, Oxford University Press, 2011) 28, commentary to 1(1)(d)).

<sup>75</sup> See Torts (Interference with Goods) Act 1977, s 3 (orders for delivery of goods); *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11, [2009] 1 WLR 2780 (the action for recovery of land is against those in wrongful possession). An order for the possession of land is not in rem; it is in personam, directed against, and binding only, the defendant: *ibid* [6] (Lord Rodger).

<sup>76</sup> In German law, Book III of the BGB, titled ‘The Law of Property’, contains in § 985 the simple proposition: ‘The owner may require the possessor to return the thing.’ This applies to both real and personal property. In French law, the owner of property who has been dispossessed may employ the *action en revendication* to get it back: F Terré and P Simler, *Droit Civil—Les Biens*, 7<sup>th</sup> edn (Daloz, 2006) 406 f. The action has no explicit source in the *Code Civil*, and indeed pre-dates it, being taken to follow from the concept of ownership itself: U Mattei, *Basic Principles of Property Law: a Comparative Legal and Economic Introduction* (Westport, CT, Greenwood Press, 2000) 183.

<sup>77</sup> For a French example, see Cass civ (3) 13 March 1996, no 93-12772 (unpublished).

<sup>78</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883, [39] (Lord Nicholls).

<sup>79</sup> *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956, 970 (Lord Diplock).

<sup>80</sup> S Douglas, ‘The Nature of Conversion’ [2009] *CLJ* 198, 218.



explanation is straightforward: the main function of the tort is to protect property rights'.<sup>81</sup> But the tort's acquisition of this proprietary purpose has led to a number of anomalies,<sup>82</sup> of which the most disturbing is the liability in damages of the innocent converter. The leading case is *Fowler v Hollins*.<sup>83</sup> A crook fraudulently obtained cotton from the claimant. The defendant cotton broker, who was entirely ignorant of the fraud, purchased it from the crook, anticipating that one of his regular clients would accept it, as indeed transpired; the defendant received a commission from the client but not a trade profit on the sale. In those circumstances, said the House of Lords, the defendant had committed an act of conversion by transferring the cotton to the client and was liable in damages to the claimant, the real owner. The proposition the Law Lords applied was that 'any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion'.<sup>84</sup>

This result seems unfair.<sup>85</sup> The situation is not one where strict liability can be justified on some established basis such as non-reciprocal risk<sup>86</sup> or the just distribution of harm within a risk community.<sup>87</sup> Nevertheless, it has been argued that, as both claimant and defendant are innocent, there is no reason why the former should be left to bear the loss.<sup>88</sup> Yet this ignores the general principle of common law: *casum sentit dominus*. Loss from accident should lie where it falls unless there is a substantial reason

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<sup>81</sup> P Cane, 'Causing Conversion' (2002) 118 *LQR* 544, 544. See further S Green and J Randall, *The Tort of Conversion* (Oxford, Hart Publishing, 2009) 70 ff.

<sup>82</sup> See further A Tettenborn, 'Damages in Conversion—Exception or Anomaly?' [1993] *CLJ* 128; N Curwen, 'The Remedy in Conversion: Confusing Property and Obligation' (2006) 26 *OJLS* 570.

<sup>83</sup> (1875) LR 7 HL 757.

<sup>84</sup> *ibid* 795 (Lord Chelmsford).

<sup>85</sup> The hardship of the outcome was noted in the decision of the House of Lords by Lord O'Hagan (*ibid* 798). Lord Nicholls observed in *Kuwait Airways* (n 78) [80] that the hardship arises especially for innocent converters who no longer have the goods. In fact, if the innocent converted has sold the goods, he will normally be able to compensate the owner out of his receipts as damages are based on the value of the goods at the date of conversion. The real injustice is where the innocent converter acts gratuitously or, as in *Hollins*, for a small commission.

<sup>86</sup> G Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 *Harvard Law Review* 537

<sup>87</sup> G Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 *Southern California Law Review* 193.

<sup>88</sup> Douglas (n 80) 217 f.

for transferring it to someone else.<sup>89</sup> Justification for the strict liability has also been sought in the need to protect property rights against intentional interference,<sup>90</sup> but this also seems dubious, as the intention goes only to what is done to the goods and not its lawfulness: the defendant is liable even if he reasonably thought that the claimant consented to the interference, or that it belonged to a third party who consented to the interference, or that it was his own property. The purported justifications also ignore the likelihood that the owner of goods will have insurance against loss or theft, and is almost always in a position easily to acquire it, so it would be wasteful to induce those dealing subsequently with the goods to insure separately against liability arising in the absence of their fault.<sup>91</sup> The inefficiency is exacerbated to the extent that the owner, as is very likely the case, is better able to estimate the value of the goods and to tailor the insurance cover accordingly.

As a second illustration, consider the law of trespass to land. A parallel problem arises to that in conversion. The law's over-enthusiastic concern to protect the owner's interest in the land leads to the inappropriate imposition of strict liability. Take these examples. A homeowner is seriously injured when he trips over a package left by a delivery driver on the wrong premises—they were previously occupied by the addressee, whose sign is still hanging outside, but the addressee has moved on.<sup>92</sup> Elsewhere, a farmer hears that the telephone company has dug a hole on his land so as to place a pole there, goes looking for it and falls in, suffering injury as a consequence.<sup>93</sup> Another landowner is killed while climbing a tree at the edge of his property when he comes into contact with electrical power lines intruding into his

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<sup>89</sup> O W Holmes, *The Common Law* (first published 1881, New York, Dover Publications, 1991) 94 ('The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune').

<sup>90</sup> Douglas (n 80) 220. See also S Green, 'Rights and Wrongs: An Introduction to the Wrongful Interference Actions', in D Nolan and A Robertson (eds), *Rights and Private Law* (Oxford, Hart Publishing, 2012) 548–50.

<sup>91</sup> Admittedly, some duplication would also arise if the dealer were to insure only against fault-based liability, but that liability does not require justification in the same way that strict liability requires justification.

<sup>92</sup> *Turner v Thorne* (1960) 21 DLR (2d) 29 (liability for personal injury in both trespass and negligence).

<sup>93</sup> *Kopka v Bell Telephone Co of Pennsylvania* (1952) 371 Pa 444, 91 A 2d 232 (liability for the injury in trespass; no liability in negligence).

airspace.<sup>94</sup> In each of these situations, courts in common law jurisdictions have accepted that liability for the injuries suffered might be imposed in the tort of trespass to land, even in the absence of negligence. This seems very hard to accept. The mere fact of the trespass does not establish a justification for strict liability—though one might of course exist independently (as perhaps in the power lines scenario). Basing strict liability in such cases on trespass to land entails an anomalous and unfair distinction between the landowner and others who are injured or killed by the same conduct, who are entitled to damages only if they prove negligence. And, at least in English law, no defence of contributory negligence can be raised in a claim of trespass,<sup>95</sup> which again unfairly privileges the trespass claimant recovering damages for personal injury over other injured persons and unfairly discriminates against the defendant trespasser.

My prescription is simple: injunctions and other forms of specific relief should not be seen as (only) remedies in tort. They should be regarded as freestanding mechanisms for protecting rights, and not limited to cases where the elements of a recognised tort or some other wrong are satisfied.<sup>96</sup> Standing alone, they will perform their function of rights-protection more effectively, and without introducing the temptation to distort tort law by recognising a liability in the absence of wrongdoing simply so as to open the door to specific relief in order to give direct effect to the right.

### C. Re-framing the Debate About the Duty of Care in Terms of Protective Scope

Whereas my first two rationalising ‘steps’ have addressed the structure of the law of tort as a whole, my third focuses on the tort of negligence, which is undoubtedly the

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<sup>94</sup> cf *Beavers v West Penn Power Co* (1971) 436 F 2d 869. The actual victim in that case was the son of the owners, but the court did not identify this as an obstacle to the parents’ claim in trespass. The court allowed the defendants’ appeal on other grounds and ordered a retrial, so did not in any case finally resolve the question of the parents’ entitlement to damages in trespass.

<sup>95</sup> Law Revision Committee, *Eighth Report* (Cmd 6032, 1939) 18. The same issue arises in relation to other intentional torts. See, as regards conversion and trespass to goods, Torts (Interference with Goods) Act 1977, s 11(1) and, as regards trespass to the person, *Pritchard v Co-operative Group Ltd* [2011] EWCA Civ 329, [2012] QB 320.

<sup>96</sup> Excluding the actual occurrence of damage where the injunction is sought *quia timet*.

most important tort in practice. If we cannot even manage to identify a rational approach to the tort of negligence, what hope have we to clarify tort law as a whole? And yet the current state of our law gives reason for serious concern on that front, as several astute commentators have observed. According to David Ibbetson, for example, '[t]hat the tort of negligence is in a mess goes almost without saying; and given its ever increasing dominance within the common law of tort, it follows that the law of tort is in a mess too.'<sup>97</sup> The late Bob Hepple noted that 'the law of negligence is almost universally criticized for its lack of coherence'.<sup>98</sup> Other scholars have demonstrated how the law of tort has fallen apart into a number of barely connected 'pockets of liability'.<sup>99</sup> And judges have expressed similar concerns, Lord Lloyd (for example) remarking that there is 'a risk that the law of negligence will disintegrate into a series of isolated decisions without any coherent principles at all'.<sup>100</sup>

A large part of the problem is the profound disagreement that exists about the very nature of the duty of care concept. Very broadly speaking, there are two schools of thought: one that sees the duty as constituting the bilateral relationship between claimant and defendant that is essential to tortious liability;<sup>101</sup> and another that sees the 'duty' language as mere camouflage for a 'control device' or 'control mechanism' that guards against excessive or inappropriate liability<sup>102</sup> or for even for an effective

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<sup>97</sup> D Ibbetson, 'How the Romans Did for Us: Ancient Roots of the Tort of Negligence' (2003) 26 *University of New South Wales Law Journal* 475, 475.

<sup>98</sup> B Hepple, 'Negligence: The Search for Coherence' (1997) 50 *Current Legal Problems* 69, 70.

<sup>99</sup> See, eg, J Stapleton, 'Duty of Care and Economic loss: a Wider Agenda' (1991) 107 *LQR* 249; K Stanton, 'Professional Negligence: Duty of Care Methodology in the Twenty-first Century' (2006) 22 *Professional Negligence* 134.

<sup>100</sup> *Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The Nicholas H)* [1996] AC 211 (HL), 230 (Lord Lloyd).

<sup>101</sup> See, eg, N McBride, 'Duties of Care—Do they Really Exist?' (2004) 24 *OJLS* 417.

<sup>102</sup> See, eg, *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1 (HL), 25 (Lord Fraser); *Caparo Industries plc v Dickman* [1990] 2 AC 605, 621 (Lord Bridge); J Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (1953) 31 *Canadian Bar Review* 471; J Morgan, 'The Rise and Fall of the General Duty of Care' (2006) 22 *Professional Negligence* 206; Lunney and Oliphant (n 4) 121 ff. As will be apparent from the analysis presented in the text, I no longer believe, contrary to what is asserted in the last-mentioned work, that the duty of care is best viewed as a control device, though it can be helpful to consider it in such fashion for particular purposes.

immunity from liability in negligence.<sup>103</sup> Though each of these theories captures something important about the duty of care concept, neither is adequate on its own to capture all its aspects. The ‘control mechanism’ theory makes the duty language a mere fiction: the duty simply indicates the situations where negligence liability may in principle arise, which is a normative judgement about the correct scope of the tort and nothing to do with the obligation on the individual defendant.<sup>104</sup> Writers in this school are therefore reduced to admitting that the duty of care is not a ‘real’ duty at all and recommend that the concept be abandoned.<sup>105</sup> Thus, according to Donal Nolan, ‘the duty of care concept is now obscuring understanding of negligence law and hindering its rational development’: it should consequently be ‘deconstructed’, with the various issues that are now subsumed under the umbrella term separated out and reclassified under other elements of the tort.<sup>106</sup> I do not go so far, and—contrary to Nolan and others of the same opinion—I believe that the duty of care, as a real duty resting on real people, can be made to perform a useful and intelligible role in the modern law of negligence.

In fact, the sheer counter-intuitive quality of the ‘control mechanism’ thesis—which will be immediately recognised by anyone who has ever tried to teach tort law to a not unreasonably bewildered class of undergraduates—has led to a resurgence of attempts to demonstrate that the duty of care is indeed a ‘real’ duty.<sup>107</sup> I sympathise with the attempt, but criticise its execution, and in particular its focus on the question of the existence of a duty of care, which assumes that it refers to a myriad set of specific duties with an on-off, fragmented character. On this alternative view, tortious liability for negligence consists of a network of reciprocal relationships constituted by the duty of care owed by one person to another. There is thus not a single ‘duty of care’ but

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<sup>103</sup> D Howarth, ‘Negligence after Murphy: Time to Re-Think’ [1991] *CLJ* 58, 93-94 (‘duty of care cases are really about giving the defendant an immunity against liability in negligence’).

<sup>104</sup> For criticism of this ‘cynical’ or ‘sceptical’ approach to duty language, see respectively McBride (n 101) 419 ff; JoGoldberg and B Zipursky, ‘The Moral of MacPherson’ (1998) 146 *University of Pennsylvania Law Review* 1733, 1799 ff.

<sup>105</sup> See especially D Nolan, ‘Deconstructing the Duty of Care’ (2013) 129 *LQR* 559; J Plunkett, ‘The Duty of Care: A Comparative Common Law Analysis’ (DPhil thesis, University of Oxford, 2015).

<sup>106</sup> Nolan (n 105) 559.

<sup>107</sup> Notably Goldberg and Zipursky (n 104) 1825 ff; McBride (n 101); Zipursky, ‘Rights, Wrongs, and Recourse’ (n 65) 55 ff.

rather numerous ‘duties of care’ (plural)<sup>108</sup> of a relatively high degree of specificity, linking a particular defendant with a particular claimant, each duty corresponding to a specific (Hohfeldian) claim right.<sup>109</sup> In Hohfeld’s language, these duties are ‘multital’: a large number of fundamentally similar duties reside in one person, correlating to the same number of claim rights residing in many others.<sup>110</sup>

This approach shares with the ‘control mechanism’ approach the problematic assumption that there are specific situations in which a duty of care ‘comes into existence’, and that the duty has an on-off character such that sometimes we owe a duty of care and sometimes we do not. Further, the duty has a fragmented character: it is *activity specific* in that I owe one duty of care in driving my car, another in operating machinery, another in playing sports, another in preparing home-made jam for sale at a fundraising event, etc; it is *loss specific* insofar as the existence of a duty of care is to be assessed relative to each type of loss the claimant suffers, so it becomes possible to say that the defendant owed a duty of care as regards the claimant’s life and (physical) health but not as regards the claimant’s purely economic wellbeing.

There are numerous reasons why such an account of the duty of care must be regarded as inadequate:

*1. Inconsistency with how the duty is really experienced.* The on-off, fragmented, multital character of the duty that is presumed is inconsistent with how the duty is experienced in the real world. As Howarth has observed, ‘the “many duties” view makes the law yet more arcane and difficult for lay people to understand’.<sup>111</sup> The duty’s *practical content* is not generally affected by limits on who is owed the duty or

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<sup>108</sup> McBride (n 101) especially at 432 f (having millions of duties not a problem, so long as they are negative duties). For criticism, see Howarth, ‘Many Duties of Care—Or a Duty of Care? Notes from the Underground’ (2006) 26 *OJLS* 449.

<sup>109</sup> See McBride (n 101); Zipursky, ‘Rights, Wrongs, and Recourse’ (n 65) especially at 63 ff; cf Hohfeld 1913 (n 65); Hohfeld 1917 (n 65).

<sup>110</sup> Hohfeld 1917 (n 65) 743–45. See further Howarth (n 108) 450 f.

<sup>111</sup> Howarth (n 108) 472.

what losses it covers.<sup>112</sup> To be intelligible, a duty must be linked with the practical actions needed to discharge it in the circumstances in question. Consider these examples:

When digging up the road outside the Spartan steel works in Birmingham what was the duty owed by the men employed by Martin & Co (Contractors) Ltd who damaged the electricity cable connecting the factory with its supply?<sup>113</sup> They undoubtedly owed a duty to take care in their excavations, but what meaning could they possibly attach to the further specification that their duty of care extended only to physical damage and not to pure economic loss? What difference would it make to the precautions they were obliged to take?

Or, when I am driving, does it make any practical difference to how I ought to drive if I am told that I owe a duty of care only to those I might hit and injure, and their relatives (but only if the latter come upon the immediate aftermath of the accident and thereby suffer psychiatric harm), and no duty of care to others who may or may not come to the scene of the accident I may or may not cause, and thereby suffer psychiatric harm?<sup>114</sup> Should I be mentally discounting the risk of psychiatric harm to mere bystanders in determining precisely how attentive I should be as I drive, or whether to overtake or engage in some other conduct involving heightened risk?

2. *An incomplete account of what constitutes reasonable care.* A further problem arises if the duty of care is taken to refer to the set of bilateral duty/claim right relations applying to a particular activity. If each duty in the set is defined only in terms of the care required so as to provide reasonable protection of the correlative claim right, then the risks posed by the activity towards *other* claim right holders are irrelevant in determining the duty's content.<sup>115</sup> But this is quite contrary to how risks and benefits are evaluated when assessing the reasonableness of the care exercised by a tort

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<sup>112</sup> Possibly in some circumstances it might make a difference if one were to exclude (say) purely economic or psychiatric interests from the calculation of what reasonable care requires, but this is certainly not so in the most typical cases of tortious liability.

<sup>113</sup> cf *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27.

<sup>114</sup> cf *McLoughlin v O'Brian* [1983] 1 AC 410.

<sup>115</sup> See, eg, A Fagan, 'Distributed Damage: A South African and Common Law Perspective' (2015) 6 *Journal of European Tort Law* 124, 135 (a claimant must show that the risk of *his* injury, on its own, was a sufficient reason for the defendant to have taken greater care than he did).

defendant. It is quite clear that, as a general rule, ‘all foreseeable risks created by the injurer should be and are considered by courts when they set the standard of care’.<sup>116</sup>

3. *Chronological incoherence.* The ‘many duties’ theory is also open to the charge of chronological incoherence insofar as whether or not a duty of care ‘exists’ can be dependent on future facts. Sometimes the future facts will be facts relating to the accident itself—for example, was the claimant within the ‘zone of physical danger’ so as to qualify as a ‘primary victim’ under *Page v Smith*<sup>117</sup> and thus entitled to damages for psychiatric harm even in the absence of physical injury? Sometimes the duty will even be dependent on facts subsequent to the accident: in the context of psychiatric harm, whether or not the duty ‘exists’ as regards a secondary victim depends (inter alia) on whether or not he or she, if not present at the scene, comes upon the immediate aftermath of the accident.<sup>118</sup> But how can the existence of my duty of care *at the time at which it must be performed* (when driving, when operating machinery, etc) depend upon a future contingency? This provides an additional illustration of how the whole idea of duty has come to be divorced from the real-life position of persons who are expected to act in conformity with it.

4. *Duty dependent on court’s ex post facto judgment.* Further chronological incoherence arises insofar as the existence of a duty is also dependant on the court’s ex post facto judgment as to whether it would be fair, just and reasonable to impose a duty of care in the circumstances that occurred. Under the tripartite *Caparo* approach that English law uses to determine the existence of a duty of care, at least in novel situations, a duty arises only when—in addition to being satisfied as to the reasonable foreseeability of harm and the ‘proximity’<sup>119</sup> of the defendant’s relationship to the claimant—‘the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.’<sup>120</sup> The circularity of the formulation is

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<sup>116</sup> A Porat, ‘Misalignments in Tort’ (2011) 121 *Yale Law Journal* 82, 124.

<sup>117</sup> *Page* (n 36).

<sup>118</sup> *McLoughlin* (n 114).

<sup>119</sup> A not unproblematic notion, but let us pass over it for now.

<sup>120</sup> *Caparo* (n 102) 618 (Lord Bridge).



immediately apparent, but what is perhaps more serious is how this leaves defendants utterly helpless to identify the scope of their duty of care (for whose interests must they take care? against which risks?) when contemplating engaging in the activity whose performance injures the claimant.

5. *Obscuring the concept of which the bilateral legal relations are postulates.* At a more fundamental level, the fragmentation of the concept of the duty of care into sets of bilateral legal relations (claim right/duty, privilege/no right) erases the composite idea of which the legal relations are postulates. This composite idea is more than the sum of its parts, insofar as the latter are identified with the specified relations; it is itself an object of legal analysis, to be understood in terms of its function, value, historical development and relationship with other legal concepts, and considerations of justice generally.<sup>121</sup> By contrast, the bilateral legal relations are purely formal in character and are analytical rather than functional.<sup>122</sup> They have no meaning for ordinary people.

6. *Specificity of bilateral legal relations inconsistent with abstract and general character of 'law'.* A last, equally fundamental problem is that, even viewed as composite sets, bilateral claim right/duty and privilege/no right relations cannot capture the abstract and general form that legal principles—commands, prohibitions, entitlements, etc—usually take (ignoring such exceptions as special rules relating to the Crown). Legal principles are formulated in impersonal terms—as duties or rights or powers of persons generally, even if they may only be applicable in particular circumstances. The duty of care is also of this nature: it is a duty imposed by law in respect of all of our social interactions, and owed by persons generally.

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<sup>121</sup> cf P Schlag, 'How To Do Things With Hohfeld' (2015) 78 *Law and Contemporary Problems* 185. There is an analogy with how property theorists have argued against the 'bundle of rights' theory of property: see especially J Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 *University of California Los Angeles Law Review* 711. A bundle of legal relations provides no explanatory model of the concept from which they are derived but merely indicates the absence of one: *ibid* 714.

<sup>122</sup> See also P Cane, 'Rights in Private Law', in Nolan and Robertson (n 90) 42 ('Hohfeldian correlativity is purely formal and definitional').

It may be objected that this account of the duty of care ignores the distinctions that have emerged in the case law between cases where injury caused by negligence may in principle give rise to liability and those in which it may not. How does one account, for example, for the general exclusionary rule applying to liability in negligence for pure economic loss or psychiatric harm? I believe that the answer lies in the duty's protective scope.<sup>123</sup> Where D's carelessness causes injury to C, the question should not be, '*Did D owe a duty of care?*', but '*Did C's injury fall within that duty's protective scope?*' This involves a normative inquiry into the losses caused by D for which he or she can justly be made to compensate. Insofar as the reason for finding a breach of duty is that the risks of D's conduct were so foreseeable that he or she ought to have taken precautions to avoid them, but did not, it is logical (but not essential) to limit D's liability to those persons who were foreseeably affected by the breach of duty and to the types of injury that were also the foreseeable consequences of the breach.<sup>124</sup> It also seems appropriate at this stage to take into account the hierarchy of protected interests, such that interests in the person and in property are presumptively protected so long as they are foreseeably injured, whereas pure economic interests presumptively fall outside the scope of the duty of care's protection (despite the foreseeability that they would be harmed). To that extent, the device of the 'protective scope' performs the function not only of 'factual duty' (the foreseeable claimant rule) but also 'notional' or 'legal' duty,<sup>125</sup> where there must be normative consideration of the claimant's entitlement to compensation for the loss suffered.<sup>126</sup>

Thus, for example, in the *Spartan Steel* case, one should say not that the defendant contractors owed a duty of care as regards the claimant's property damage

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<sup>123</sup> cf Koziol (n 68) para 7/15 ff (protective purpose of the rule on which liability is based). For a more sceptical analysis, see M Stauch, 'Risk and Remoteness in Negligence' (2001) 64 *MLR* 191, 197–99, suggesting that the theory of protective scope is convincing only in cases of pre-existing relationship.

<sup>124</sup> See especially *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082 (HL), 1091 (Lord Hoffmann).

<sup>125</sup> As to the terminology, see Nolan (n 105) 563.

<sup>126</sup> The idea of protective scope cannot solve the particular problems associated with liability for omissions, though these may be adequately addressed—without inconsistency with the approach I am proposing—by other means. One need only observe that the duty of care is generally limited to affirmative conduct and does not usually entail a duty to undertake positive actions for the benefit of third parties. This seems a simple, intelligible notion that does not involve any distortion of the ordinary concept of duty, though naturally the policy choices that underpin the principle are open to debate and criticism.

but no duty of care as regards its pure loss of profit, but that they owed (one) duty of care whose protective scope encompassed the claimant's property damage but not its pure loss of profit. And, in a psychiatric injury case, one should avoid thinking that the defendant owed (separate) duties of care to the primary victim's relatives who were present at the accident, but no duty of care to relatives who were neither present at the accident nor came upon its immediate aftermath, or to unrelated bystanders; instead, one should say that the relatives present at the accident fell within the duty of care's protective scope, while the other persons specified did not.

This way of avoiding the problems associated with the focus upon the duty of care's *existence* is not entirely alien to our courts, having been relied upon in a number of recent appellate decisions.<sup>127</sup> But the seeds thereby sown have yet to germinate. It is now time for us to give them some reproductive assistance.

### III. In Place of a Conclusion

I end this chapter with a rallying call in place of a conclusion. If we, as tort lawyers, care about the future development of this highly politicised area of private law, then we must engage with the public debates about it. We have to overcome the tendency of those of us in academia to focus on common law to the exclusion of statute.<sup>128</sup> We cannot simply let major reforms slip past us.<sup>129</sup> If we allow fundamental principles to be eroded,<sup>130</sup> the damage may be irreparable. But, just as we must challenge the

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<sup>127</sup> *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL) (Lord Hoffmann); *Jolley* (n 123) 1091 (Lord Hoffmann); *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL), *passim*; *Rees v Darlington Health Board* [2004] 1 AC 309 (HL) [63] (Lord Hope) and [106] ff (Lord Millett). See also *Calvert v William Hill Credit Ltd* [2008] EWCA Civ 1427, [2009] Ch 330.

<sup>128</sup> See eg Cane (n 7); B Zipursky, 'Coming down to Earth: Why Rights-Based Theories of Tort Can and Must Address Cost-Based Proposals for Damages Reform' (2006) 55 *DePaul Law Review* 469, 470.

<sup>129</sup> cf the largely unchallenged, and perhaps also largely unnoticed, abolition of the century-old tradition of strict liability for breach of industrial safety standards (first recognised in *Groves v Lord Wimborne* [1898] 2 QB 402) by s 69 of the Enterprise and Regulatory Reform Act 2013.

<sup>130</sup> cf the announcement in the Chancellor of the Exchequer's Autumn Statement in November 2015 that the Government would bring forward measures, following a consultation on the details in 2016, to remove the right to claim general damages for minor whiplash injuries: <https://www.gov.uk/government/publications/spending-review-and-autumn-statement-2015-documents/spending-review-and-autumn-statement-2015>; see further J Hyde, 'Spending Review:

rhetoric where it is overblown,<sup>131</sup> and the figures when they are misused,<sup>132</sup> we must make sure our own house is in order. The incoherence that reigns in large parts of our law of tort is a major barrier to our communication of its key tenets and our engagement in debates about its future. Ultimately, as suggested by others in this volume, codification or restatement of the law may be the best way forward.<sup>133</sup> But that can proceed only on the basis of a more rational understanding of tort law than prevails today. I hope that the ideas put forward in this chapter may assist in that process of rationalisation.

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Osborne Raises Small Claims Limit to £5k and Scraps Whiplash Compensation', LS Gaz, 25 November 2015.

<sup>131</sup> See, eg, K Oliphant, "The Whiplash Capital of the World": Genealogy of a Compensation Myth', in Eoin Quill and Raymond Friel (eds), *Damages and Compensation Culture: Comparative Essays* (Oxford, Hart Publishing, forthcoming 2016).

<sup>132</sup> See, eg, R Lewis, A Morris and K Oliphant, 'Tort Personal Injury Claims Statistics: Is There a Compensation Culture in the United Kingdom?' (2006) 14 *Torts Law Journal* 158.

<sup>133</sup> See especially the contributions to this volume of Martin Hogg and Andrew Burrows, and the latter's *Restatement* (n 74).